IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEALS NO. 1 AND 2 OF 2002.

TAX APPEAL NO. 1 OF 2002.

The Commissioner of Income Tax,
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. .... Appellant.

Versus

1. Shri Minguel Chandra Pais,
   E-15, Bainfall,
   Assolna, Salcete, Goa.

2. The Income Tax Appellate Tribunal,
   Panaji Bench, Aaayakar Bhawan,
   Patto Plaza, Panaji, Goa. .... Respondents.

TAX APPEAL NO. 2 OF 2002.

The Commissioner of Income Tax,
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. .... Appellant.

Versus

1. Smt. Maria Leila Tovar Furtado
   e Pais,
   E-15 Bainfall,
   Assolna, Salcete, Goa.

2. The Income Tax Appellate Tribunal,
   Panaji Benc, Aayakar Bhawan,
   Patto Plaza, Panaji, Goa. .... Respondents.

Mr. S. R. Rivonkar, Advocate for the Appellant.

Mr. S.V. Pikale, Advocate for the Respondent No.1.

CORAM: A. P. LAVANDE &
N. A. BRITTO, JJ.

Date of reserving the Judgment: 07.03.2005.
Date of Pronouncing the Judgment: 23.03.2005.

J U D G M E N T : (PER BRITTO, J.)

These appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 were admitted on a substantial question of law which reads as follows :-

> " Whether on the facts and in the circumstances of the case the assessee's land could be termed as agricultural land ?"

2. Some facts are required to be stated to dispose of both the appeals: The respondents in both the appeals are the assessees - husband and wife and though they are non-resident Indians from the year 1983 or thereabout, they are governed by the regime of communion of assets as in force in this State. In May, 1995 they sold their ancestral property bearing Survey Nos.103/1 and 102/4 admeasuring about 65,282 sq.metres to

M/s Sunset Resort Pvt. Ltd. for a sum of Rs.2,88,10,600/- which works out to a price of Rs.441.33 per sq.m. The assessees did not declare capital gains on the sale of the said property and therefore a notice under S.143(2) of the Act was issued to them and in reply to the said notice they contended that the land held by them was agricultural land having coconut and cashew plantation.

3. The Assessing Officer by his Order dated 14.10.98 held that they were required to pay Rs.26,06,040/- each as tax on long term capital gains for assessment year 1996-97 stating that the land sold by them was barad in nature and was not capable of agricultural operations. The Assessing Officer noted that the assessees were non-resident Indians and there was no one to look after the said land. The Assessing Officer declined to accept that the father of the male assessee who was an old man, could look after the said property or involve himself in agricultural activities and also noted that the trees were not planted in a row and in order. He was also of the view that the price at which the land was sold showed that it was not agricultural land and besides, the land was adjacent to 4 five Star Hotels namely Holiday Inn, Donna Sylvia, Dalmia Old Anchor and Hotel Leela Palace. It may be stated here that M/s Sunset Resort Pvt. Ltd. is said to be sister concern of Hotel Leela Palace.

4. The assessees then filed appeals to the Commissioner of Income Tax, Belgaum (CIT(A)). Before the C.I.T.(A) the assessees filed affidavits of one Smt. Salvacao Correia e Fernandes who stated that she was employed by the said father as a house servant and that she was also working in the property along with other labourers and had done the plantation of coconut saplings, cashew plants, watering, manuring and plucking of fruits. An affidavit of Bosco Rodrigues, a panch member of the Village Panchayat of Cavelosim was also filed and who had stated that he had seen labourers working prior to the sale of the property in the coconut plantation and other fruit bearing trees existing in the said property. A report of Shri Menezes, registered valuer who had opined that the property was agricultural land was also filed.

5. The C.I.T.(A) carried out an inspection on 18.3.99 and he found that the land of survey No.102/4 was adjacent to Hotel Holiday Inn, being a rectangular strip, with one side of it touching River Sal and the other side touching the road; he found that part of the land which was on the river side was marshy and was not fit for agricultural or horticultural use and the other part was open land without any trees. He found that survey No.103/1 was a stretch extending from the bank of River Sal on one side to the sea shore on the other side and was divided in two parts by the road leading to Margao and the land between the road and the river was

found to be covered by coconut, cashew, mango and acacia trees, with a mundcarial house in it and the mundcar had been looking after horticultural operation since long. He also found that coconut trees were found planted more or less under a regular plan. He also found that the other portion stretching from the road to the sea shore was having coconut plantation only on the sea side, but on the road side it was a barren land having sand dunes, some cashew shrubs strewn here and there and according to him the cashew shrubs were not planted but were part of natural growth. The C.I.T.(A) ultimately treated 2/3 portion of survey No.103/1 as garden land where plantation of mainly coconut trees was done. He held that 1/3 portion of this land could not be said to be agricultural land. The C.I.T.(A) therefore directed that the sale proceeds of 1/3 of Survey No.103/1 and the sale proceeds of Survey No.102/4 could be charged to capital gains and thus partly allowed the appeals.

6. Both the parties then filed appeals before the Income Tax Appellate Tribunal (ITAT), Panaji Bench, and the ITAT by judgment dated 28.9.01 was pleased to allow the appeals filed by the assessees and dismiss the appeals filed by the Revenue. The ITAT came to the conclusion that the documentary evidence produced by the assessees and its prevailing nature and considering all surrounding facts brought on record, it was of the opinion that the land sold was agricultural land. The C.I.T. also

found that the land was in settlement zone and the said property was situated in village Cavelosim, outside the Municipal limits as well as notified outer limits.

7. Before this Court, on behalf of the Revenue, two judgments have been `relied. The first is in the case of ***Sarifabibi Mohmed Ibrahim (Smt) and Others v. Commissioner of Income Tax, Gujarat (1993 Supp (4) S.C.C. 707)*** and the second is of this Court in the case of ***Gopal C. Shrma v. Commissioner of Income-Tax (1994 ITR 946 Vol209) in which*** the case of Smt. Sarifabibi Mohmed Ibrahim (supra) was referred to and relied amongst other cases.

8. Shri Rivonkar, the learned counsel on behalf of the Revenue (appellants) has submitted that the ITAT has not followed all the tests laid down by the Hon'ble Supreme Court in the case of Sarifabibi Mohmed (supra) and that at least eight of the tests laid down by the Supreme Court favoured the Revenue. As per Shri Rivonkar, the price at which the property was sold certainly required more weight to be given because at that rate no one would have bought the property for agricultural purpose. According to him, the tests laid down by the Supreme Court in the said case of Sarifabibi have not at all been followed by the learned ITAT.

9. On the other hand, Shri S.V. Pikale, the learned counsel of assessees, (Respondents) has submitted that the substantial question of law as framed by this Court does not arise at all. As per Shri Pikale, the learned ITAT has given a finding of fact that the property sold is agricultural land and the same cannot be disturbed under S.260A of the Act. Shri Pikale has also referred to the case of ***M. Janardhana Rao v. Jt. Commissioner of Income Tax (2005 Vol.273 ITR 50)*** in support of his submission that a finding of fact cannot be disturbed in appeal under S.260A of the Act. Shri Pikale has also referred to the case of **Santosh** ***Hazari v. Purushottam Tiwari [(2001) 3 SCC 179]*** wherein the Hon'ble Supreme Court has defined what is a substantial question of law and it is only when a substantial question of law is involved that the interference of this Court is called for under S.260 of the Act.

10. It may be noted that both the cases of Gopal Sharma v. Commissioner of Income Tax (supra) as well as Sarifabibi Mohmed v. Commissioner of Income Tax (supra) were referred to and relied upon by the authorities below including the learned ITAT and after considering the same, they came to conclusions to which a brief reference has already been made.

11. Section 260A of the Act is analogous to S.100 of C.P.C. Both the said provisions provide that an appeal shall lie to this Court only in case this

Court is satisfied that the case involves a substantial question of law. Sub-section (4) of S.260A of the Act and sub-section (5) of S.100 of C.P.C. provide that the appeal shall be heard on the questions so formulated, and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. As stated, it is the case of the assessees that the question framed is not at all involved in these appeals.

12. The Supreme Court in the case of Santosh Hazari (supra) has stated that pure findings of fact remain immune from challenge before the High Court in second appeal. The first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one. The Supreme Court has further held that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law involved in the case there must be first a foundation for it laid in the

pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. Therefore it will depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not.

13. In the case of ***Mahavir Woollen Mills v. Commissioner of Income Tax (2000 ITR 245 297)*** the then learned Chief Justice of the Delhi High Court Mr. Justice Arijit Pasayat writing for the Division Bench stated that the words "substantial questions of law " has acquired a definite connotation through a catena of judicial pronouncements and usually five tests are used to determine whether a substantial question of law is involved. They are as follows : (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. The Division Bench also stated that there is no scope for interference by the High Court on a finding recorded when such finding could be treated to be a finding of fact.

14. The view held in Mahavir Woolen Mills has now become the law laid down by the Hon'ble Supreme Court in the case of M. Janardhana Rao (supra).

15. The Supreme Court in the case of Sarifabibi (supra) has approved the decision of a Division Bench of the Gujarat High Court in the case of ***CIT v. Siddharth J. Desai [(1983) 139 ITR 628*** and has laid down 13 tests or factors which are required to be considered and upon consideration of which the question whether the land is an agricultural land or not has got to be decided or answered. We could reproduce the said 13 tests with advantage. They read as follows :-

" (1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue ?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time ?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stopgap arrangement ?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational

proportion to the investment made in purchasing the land ?

(5) Whether, the permission under Section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land ? If so, when and by whom (the vendor or the vendee) ? Whether such permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date ?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use ? If so, whether it was put to an alternative use ? Whether such cesser and/or alternative user was of a permanent or temporary nature ?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled ? Whether the owner meant or intended to use it for agricultural purposes ?

(8) Whether the land was situate in a developed area ? Whether its physical characteristics, surrounding situation and and use of the lands in the adjoining area were such as would indicate that the land was agricultural ?

(9) Whether the land itself was developed by plotting and providing roads and other facilities ?

(10) Whether there were any previous sales of portions of the land for non-agricultural use ?

(11) Whether permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist ? If so, whether the sale or intended sale to such non-agriculturist was for non-agricultural or agricultural user ?

(12) Whether the land was sold on yardage or on acreage basis ?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield ? “

16. At the same time, the Supreme Court has stated that whether a land is an agricultural land or not is essentially a question of fact. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them – a process of evaluation and the inference has

to be drawn on a cumulative consideration of all the relevant facts. The Supreme Court has further stated that not all these factors or tests would be present or absent in any case and that in each case one or more of those factors may make appearance and that the ultimate decision will have to be reached on a balanced consideration of the totality of the circumstances.

17. Section 2(14) of he Act defines capital asset to mean property of any kind held by an assessee, whether or not connected with his business or profession, but does not include, inter alia agricultural land in India, not being land situate –

(a) in any area which is comprised within the jurisdiction of a Municipality (whether known as Municipality, Municipal Corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board or which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette.

18. The expression “agricultural land” is not defined in the Act, and now, whether it is agricultural land or not has got to be determined by using the tests or methods laid down by the Hon'ble Supreme Court in the case of Sarifabibi Mohmed (supra). As already stated, all the authorities under the Act as well as the learned ITAT was fully aware of the tests laid down by the Hon'ble Supreme Court and after considering the said tests the CIT(A) and the ITAT have come to the conclusion (the former partly and the latter fully) that the land sold by the assessees was agricultural land and this,in our view, is a finding of fact which cannot be interfered in an appeal under S.260A of the Act. It is to be noted that it is a finding which was rendered after considering the totality of circumstances and if one or two or three of the tests were in favour of the Revenue, the same would not make the finding a perverse finding. It is only a perverse finding which could be interfered with in an appeal under S.260 of the Act. A perverse finding is a finding where there is no evidence to support it or it is based on material which is irrelevant or partly relevant and partly irrelevant or it is based on conjectures or surmises or partly on these and partly on evidence, or a finding which is so perverse and unreasonable that no person acting judicially and properly instructed in law would have arrived at it. In other words, as stated in Mahavir Woollen Mills (supra) a question of fact becomes a question of law, if the finding is either without any evidence or

material, or the finding is contrary to evidence or is perverse or there is no direct nexus between the conclusion of fact upon which that conclusion is based. This is not the case at hand. It is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to a correct conclusion upon a matter of fact. In our view, therefore, the finding arrived at by the learned ITAT that the property sold by the assessees was an agricultural land is a finding which has been rendered after considering the totality of the circumstances and the tests laid down by the Hon'ble Supreme Court in the case of Sarifabibi Mohmed (supra) and therefore calls for no interference from this Court.

19. The learned ITAT had relied upon Forms No.I and XIV of both the sub-divisions of the property of the assessees wherein their property was predominantly shown as garden land and therefore agricultural in nature. The learned CIT(A) ought to have seen whether the land sold was predominantly agricultural or not. The learned ITAT had also observed that the assessees had produced receipts for payment of land revenue which could not be ignored. Admittedly, the subject land was situated in a village and at a distance of about 15 kms. from the municipal limits as noted by the CIT(A). The CIT(A) visited the subject land, but however the learned ITAT found fault with his visit, stating that he ought to have given a finding on the basis of the evidence produced

before him. In our view, there was nothing wrong in the CIT(A) to have visited the subject land in order to appreciate in a better way the evidence produced by the assessees before him. The assessees had also produced an award of the Land Acquisition Officer dated 14.11.1990. This award showed that by Notification issued under S.4(1) of the Land Acquisition Act, 1894 a portion of Survey No.103/1 (part) was acquired and the male assessee was paid compensation due thereon. The assessees had produced the said award because the L.A.O. had observed that the lands acquired by virtue of the said notification were agricultural lands only, as the interested parties had neither converted nor made any plans nor taken any steps towards the conversion of the said land into non-agricultural. As regards the affidavits filed and the report by the ex-Director of Agriculture, the learned ITAT was right in observing that what was stated therein could be discarded only after they were brought and cross-examined which was not done by the CIT(A). All the aforesaid documents produced by the assessees showed that the acquired land was agricultural. In this context, reference could be made to the case of ***Wealth Tax v. Officer-in-charge (Court of Wards) Paigah[(1976) 105 ITR 133]*** wherein the Constitution Bench of the Hon'ble Supreme Court stated that the term “agriculture” and “agricultural purpose” was not defined in the Indian Income Tax Act and that we must necessarily fall back upon the general sense in which they have been understood in

common parlance. The Hon'ble Supreme Court observed that the term 'agriculture' is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and raising on the land all products which have some utility either for someone or for trade and commerce. It will be seen that the term 'agriculture' receives a wider interpretation both in regard to its operation as well as the result of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of it cultivation of the land in the sense of tilling of the land, sowing of the seeds, planting and similar work done on the land itself and this basic conception is essential sine qua non of any operation performed on the land constituting agricultural operation and if the basic operations are there, the rest of the operations found themselves upon the same, but if this basic operations are wanting, the subsequent operations do not acquire the characteristics of agricultural operations. The witnesses whose affidavits were produced had clearly stated that labourers were seen working in the subject land until it was sold to M/s Sunset Resorts Pvt. Ltd. The Assessing Officer had noted that the father of the male assessee was an old man and was not capable of involving himself in agricultural pursuits. It was common knowledge in this State that gentlemen of the landed gentry at times only supervised agricultural operations which were generally done once a year or once in two years from under the shade of their own umbrellas and

therefore it could not be said that only because the father of the male assessee was an old man, he could not involve in agricultural pursuits. It may be noted that the term “to cultivate” in The G.D.D. Agricultural Tenancy Act, 1964 with its grammatical and cognate expressions means to till land for the purpose of raising or improving agricultural produce whether by manual labour or machinery or to carry on any agricultural operations thereon and the expression 'uncultivated' is to be construed correspondingly. The Constitution Bench of the Supreme Court in the aforesaid case observed that the entries in revenue records were considered good prima facie evidence and the Gujarat High Court in the case of ***Motibhai D. Patel (Dr.) v. Commissioner of Income Tax [(1981) 127 ITR 671]*** referring to the Constitution Bench had stated that if agricultural operations are being carried on in the land in question at the time when the land is sold and further if the entries in the revenue records shows that the land in question is agricultural land, then, a presumption arises that the land is agricultural in character and unless that presumption is rebutted by evidence led by the revenue, it must be held that the land was agricultural in character at the time when it was sold (emphasis supplied). The Division Bench of the Gujarat High Court further held that there was nothing on record to show that the presumption raised from the long user of the land for agricultural purpose and also the presumption arising from the entries of the revenue

records are rebutted. The same is the case at hand. This Court in the case of ***Commissioner of Wealth Tax v. H.V. Mungale [(1984) 145 ITR 208]*** held that the Supreme Court had pointed out that the entries raised only a rebuttable presumption and some evidence would, therefore, have to be led before taxing authorities on the question of intended user of the land under consideration before the presumption could be rebutted. The Court further held that the Supreme Court had clearly pointed out that the burden to rebut the presumption would be on the Revenue. This Court held that the ratio of the decision of the Supreme Court was that what is to be determined is the character of the land according to the purpose for which it was meant or set apart and can be used. It is therefore obvious that the assessees had abundantly proved that the subject land sold by them was agricultural land not only as classified in the revenue records, but also it was subjected to the payment of land revenue and that it was actually and ordinarily used for agricultural purpose at the relevant time. It was nobody's case that the assessees had obtained any permission for non-agricultural use as required under the G.D.D. Land Revenue Code, 1968 in respect of the subject land or any portion thereof. The assessees had also proved that on the relevant date of sale, the subject land had continued to be put to agricultural use and that it was always used for agricultural purpose. The assessees had satisfied most of the tests which were laid down by the

Hon'ble Supreme Court in the case of Sarifabibi (supra). As far as test No.4 is concerned, one may tend to argue that the price paid by the buyer was rather on the higher side, but two things are required to be taken note of. The first is that the subject land was abutting the land owned by the sister concern of the buyer and secondly it is also probable that the said buyer wanted to continue to use the subject land for agricultural purpose so as to be an added attraction to the said sister concern or to do landscaping, etc. In this context it may also be stated that the subject land had also not lost its physical characteristics at the time of sale or soon thereafter by the setting up of the said Hotels nearabout it. We may refer to the case of ***Commissioner of Income-Tax, Gujarat-III v. Manilal Somnath (1977 ITR 917)*** wherein the Division Bench observed that the potential non-agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land on the relevant date of sale. We may also refer to the case of ***Gopal C. Sharma v. Commissioner of Income Tax (1994 ITR 209)*** wherein a Division Bench of this Court has stated that the profit motive of the assessee selling the land without anything more by itself can never be decisive for determination of the issue as to whether the transaction amounted to an adventure in the nature of trade. In other words, the price paid is not decisive to say whether the land is agricultural or not. As far as test

No.12 is concerned, there is no dispute that the subject land was sold on square metre basis. This test is not relevant in this State. It is quite probable that Courts elsewhere in the Country consider that fixation of price with reference to square foot is generally a characteristic of non-agricultural land, but we must hasten to add and remind ourselves, that as a Country we have given up the yard (British system of measurement) long back and adopted the metre (metric system of measurement) and as far as this State is concerned, whether it is flats which are sold or land which is sold, the same is always sold on sq.metre basis. A normal agriculturist might have not paid the price at which the subject land had been sold and this is as far as test No.13 is concerned, but as said before the land had special significance to the buyers as it was abutting Hotel Leela Beach. As far as the intended use was concerned, the subject land had remained in the same condition as before without any changes carried out at least till the decision of ITAT. The subject land has been purchased by a sister concern of Leela Beach Resort and as noted by the learned ITAT, the memorandum and articles of association of the said company show that its main object is to do agricultural operations. The learned ITAT has also taken note of the fact that the subject land fell in CR Zone and being so, it will not be possible to be put to any construction activity . In our view the learned ITAT was right, upon consideration of all the tests or factors laid down by the Supreme Court,

in coming to the conclusion that the subject land was agricultural and the sale of the same did not invite the payment of capital gains.

20. In view of the above, we find there is no merit in these appeals. Consequently, the same are hereby dismissed. We leave the parties to bear their own costs.

A. P. LAVANDE, J.

N. A. BRITTO, J.

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